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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 986

HARBOR MARINE CONTRACTING COMPANY, a Corporation,

and

LIBERTY MUTUAL INSURANCE COMPANY, a Corporation,

Petitioners,

v.

SAMUEL S. LOWE, Deputy Commissioner of the United States Employees' Compensation Commission, Second Compensation District,

and

FRANCOIS RIVIERAO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

NELSON T. HARRISON,
HOWARD BOYD,
GEORGE E. MONK,
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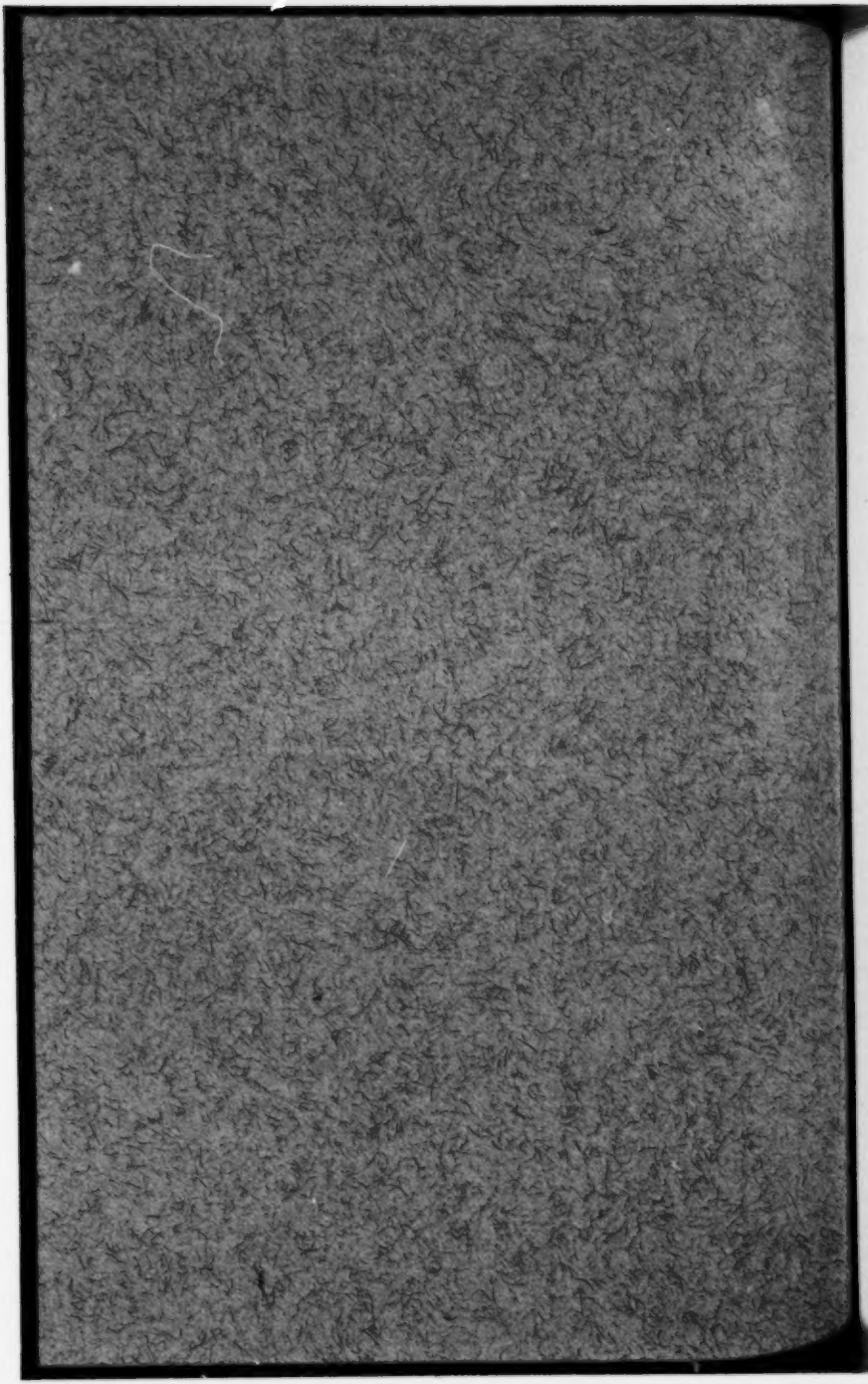

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HARBOR MARINE CONTRACTING COMPANY, a Corporation,

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SAMUEL S. LOWE, Deputy Commissioner of the United States Employees' Compensation Commission, Second Compensation District,

and

FRANCES RIVIELLO,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Harbor Marine Contracting Company, a corporation, and Liberty Mutual Insurance Company, a corporation, respectfully petition this Honorable Court to issue a writ of cer-

tiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit in the above entitled case (its Docket No. 19964) on December 24, 1945 (R. 125) affirming an order and judgment of the United States District Court for the Southern District of New York.

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This case involves the construction and interpretation of the following section of the Longshoremen's and Harborworkers' Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. 1424; 33 U. S. C. 901-950):

> "Sec. 902. Definitions. When used in this chapter—
>
> * * *
>
> (2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.
>
> * * *
>
> (11) "Death" as a basis for a right to compensation means only death resulting from an injury."

The respondent Samuel S. Lowe as deputy commissioner awarded death benefits under said Act to respondent Frances Riviello as a result of the death of her husband, Biagio Riviello, an employee of petitioner Harbor Marine Contracting Company (R. 11).

Suit to set aside the award was filed under section 21 of the Act (33 U. S. C. 921) in the United States District Court for the Southern District of New York by petitioners, the petitioner Liberty Mutual Insurance Company being the compensation insurance carrier (R. 3). Said District Court

dismissed petitioners' complaint and rendered final judgment for respondents upon a motion by petitioners and a cross motion by respondents for summary judgment, the issues raised by the complaint and answer being only questions of law (R. 115).

On appeal to the United States Circuit Court of Appeals for the Second Circuit the judgment of the District Court was affirmed (R. 125).

The petitioners will hereinafter be referred to as plaintiffs, and the respondents as defendants.

On February 15, 1943, Biagio Riviello, hereinafter referred to as "the deceased", commenced to work for the plaintiff employer (R. 23). He had never worked for plaintiff employer prior to that day. The plaintiff employer was engaged in doing certain repair work upon a ship designated as Hull No. 162. Part of the repair work consisted in cleaning the ship's boilers which had been shut down for 48 hours prior to the commencement of the work. The deceased was assigned to a gang whose job was to sweep the soot from the floor of the boiler with a long handled broom. The space inside the boiler was at least 30 feet long, about 35 feet wide, and about 48 feet high. It was dirty work because the soot flew around and the ventilation was not very good (R. 9, 42), but they had masks for protection and many of them found that a clean rag over the nose and mouth was even better (R. 42). All that these men had to do, including the deceased, was to clean up the soot and put it in bags (R. 41). According to the foreman, it was light work (R. 33, 42).

After the deceased had been doing this work for about an hour the gang foreman told the head foreman that the deceased complained that he was not feeling well (R. 33). The head foreman told the gang foreman to put the deceased to work up on deck carrying bags of soot from the ship to the pier. This consisted of carrying bags of soot, weighing about 15 pounds each, one bag at a time, a distance of about one block (R. 34). After doing this work for about 45 minutes, the deceased complained that he did

not feel well and was taken to the hospital. There was no testimony concerning the occasion for taking deceased to hospital other than the complaint of not feeling well. He was taken to the Army doctors on the pier and from there was taken to the hospital (R. 34).

The hospital records stated that while the deceased was at work he had a sudden severe pain over his heart and had never had any similar attacks (R. 95). During the first few days in the hospital the deceased's condition was poor, the hospital records indicating that he was acutely ill suffering from a heart condition known as myocardial infarct (R. 96). Upon medication and rest the deceased gradually came back to normal and on March 30, 1943, he was discharged with the remark that he made a very good, uneventful recovery and was discharged in good condition (R. 99).

After his discharge the deceased returned home and did no work (R. 27). He complained of pain and was treated by a doctor who advised him to lie in bed and be very careful (R. 27). However, on April 26, 1943, according to the hospital records, the deceased was again admitted to the hospital, and the history states that after the deceased's original discharge from the hospital on March 30, he was at home feeling well until April 17 when he had a severe pain over the heart (R. 103). The pain continued until his readmission to the hospital on April 26. He died on May 5, 1943 while in the hospital. The final diagnosis on the hospital records was death from cardiac failure, myocarditis and coronary sclerosis with extreme narrowing of the anterior descending branch of the left coronary and infarct of the left ventricular wall (R. 105, 109).

The defendant claimant as the deceased's widow thereupon filed claim for death benefits for herself and children under the Longshoremen's and Harborworkers' Compensation Act, contending that the deceased, her husband, had sustained an accidental injury arising out of and in the course of his employment which resulted in his death (R. 23). The plaintiffs as employer and compensation insurance carrier took issue with this contention, and asserted

that his disability and death was due to an illness (R. 23).

Prior to February 15, 1943, the deceased was suffering from a progressive disease known as coronary sclerosis, a deterioration of the coronary arteries (R. 9, 71, 80, 81). Medical testimony was produced in behalf of claimant (refuted, however, by defendants (R. 55)) that the coronary condition suffered by the deceased on February 15 was causally connected with the work that decedent was doing for the plaintiff employer on the morning of that day (R. 79).

After hearing before defendant Lowe as Deputy Commissioner, there was issued a compensation order awarding death benefits to the widow for herself and her dependent children and making among others the following findings of fact (R. 8):

1. That while the deceased was engaged in his work on February 15, 1943, he became ill.

2. That the illness was due to a coronary infarct which was induced by his work and working conditions on the morning of his employment.

3. That deceased died on May 5, 1943 of coronary sclerosis.

4. That the death was a result of the accidental injury sustained in the course of his employment on February 15, 1943.

There was no evidence or finding that there was any unusual incident or unusual strain or unusual occurrence or unusual working conditions or excessive exertion occurring during deceased's work and operating as a cause of his death. There was only evidence that the ordinary light work that deceased was doing for plaintiff employer on February 15, 1943 caused the condition from which he later died because his diseased heart could not stand the exertion required by such work.

The only issue in litigation in the District Court and Circuit Court of Appeals below was whether there was any sub-

stantial proof that deceased's death resulted from an "accident" within the meaning of the section of the statute which limits compensation to disability or death resulting from "accidental injury" (33 U. S. C. 902 Sub. 2).

B.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Second Circuit was entered December 24, 1945.

The jurisdiction of this Court is invoked under its Rule 38 (5) and Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925 (28 U. S. C. 347 (a)).

C.

QUESTIONS PRESENTED.

1. What is the scope and meaning of the term "accidental injury" as used in Section 2 (2) of the Federal Longshoremen's and Harbor Worker's Compensation Act (33 U. S. C. 902 (2))?

2. Are benefits or compensation payable under said Longshoremen's and Harbor Worker's Compensation Act for "accidental injury" where the employee dies from a pre-existing heart disease and there has been no accident, i.e., an unusual, undesigned, fortuitous and unexpected event as a result of which an injury follows, operating as a cause of the death?

3. Does the term "accidental injury" within the meaning of the Section 2 (2) of the said Longshoremen's and Harbor Worker's Compensation Act apply to heart failure on the part of an employee (with pre-existing heart disease) resulting only from the employee's ordinary and usual work without there being any unusual incident or unusual strain or unusual occurrence or unusual working conditions or excessive exertion operating as a cause of such heart failure?

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals below has decided an important question of federal law involving construction of a federal statute, which question has not been, but should be, settled by this Court. See *Del Vecchio* v. *Bowers,* 296 U. S. 280, 285.

2. The case here presented is of great, general importance and relates to the construction and effect to be given to Section 2 of the federal Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 902). See *Canadian Aviator* v. *United States,* 324 U. S. 215, 216.

3. The definition of "accidental injury" under the federal Longshoremen's and Harbor Workers' Compensation Act is of such paramount importance to all employees and employers governed by the Act as to call for an exercise of this Court's power of supervision over this cause. Such definition would fix with certainty in a large group of cases under the Act a limit to the rights of claimants and the liability of employers and insurance carriers.

4. The decision below results in a substantial denial of justice. Heart disease develops from the ordinary risks of life, and is now one of the principal causes of death. Said decision placing liability upon the employer, as an accident, for heart failure resulting from ordinary and usual work without an unusual incident or unusual strain or unusual occurrence or unusual working conditions or excessive exertion on part of employee has the practical effect of converting workmen's compensation to health or life insurance with respect to heart disease and similar ailments. It is always possible for a claimant to produce medical testimony that any exertion, however, slight, would be a contributing cause to heart failure, and thus satisfy the requirement that the finding of causal relationship be supported by evidence. Said decision unjustly places the en-

tire burden of a pre-existing illness, like heart disease, on the last employer. This is especially true in the present case where the heart failure representing the culmination of a pre-existing heart disease happened to occur during an employment which had commenced only on the same morning of the heart attack and had not continued more than two hours. Said decision will be detrimental to workers in that it will tend to cause the requirement for employment that employees be young and in perfect physical condition. The work the deceased was doing on February 15, 1943, the day of the heart attack, was so light that any of deceased's normal activities could have been the "last straw". In fact, the disease was of such progressive nature that death could have resulted without exertion.

5. The United States Circuit Court of Appeals below gave an erroneous interpretation of the term "accidental injury" as used in Section 2 of the said Federal Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 2 (2)). It is respectfully submitted that normal working conditions (hastening disability or death caused by a pre-existing disease) should not be considered as accidental. See *Pierce* v. *Phelps*, 26 Pac. (2d) 1017 (Arizona-1933); *Standard Gas Equipment Corp.* v. *Baldwin*, 152 Md. 321, 136 A 644 (1927); *Woodruff* v. *Howes*, 228 N. Y. 276, 127 N. E. 270 (1920); *La Fountain* v. *La Fountain*, 284 N. Y. 729, 31 N. E. (2d) 199 (1940); *Lamphier* v. *Air Preheater Corp.*, 278 N. Y. 403, 16 N. E. (2d) 382; *Crispin* v. *Leedom and Worrall Co.*, 341 Pa. 325, 19 A (2d) 400 (1941). The New York opinions are especially persuasive and indicative of congressional intent as the federal Act was modeled on the New York Workmen's Compensation Law.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full

and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 19964, HARBOR MARINE CONTRACTING COMPANY and LIBERTY MUTUAL INSURANCE COMPANY, *Plaintiffs-Appellants*, v. SAMUEL S. LOWE, Deputy Commissioner of the United States Employees' Compensation Commission, Second Compensation District, and FRANCES RIVIELLO, *Defendants-Appellees*, and that the judgment therein of said United States Circuit Court of Appeals for the Second Circuit be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

HARBOR MARINE CONTRACTING COMPANY
and
LIBERTY MUTUAL INSURANCE COMPANY,

By NELSON T. HARTSON,
HOWARD BOYD,
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Counsel for Petitioners.